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December 18, 2008

Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2007-40
Proposed amendment to MCR 7.205(F)

Dear Mr. Davis:

As the court noted in *Beavers v Barton Malow Co*, 480 Mich 1049 (2008), there is "uncertainty" as to the allowable period for an application for leave to appeal when an appeal is dismissed and it is too later to file an appeal as of right. In the *Beavers* opinion, the court indicated that it "plan[ed] to open an administrative file to explore whether to amend MCR 7.205(F)(3) . . ."

The Appellate Practice Section appreciates the opportunity to comment on ADM 2007-40, which represents the Court's implementation of the plan referred to. The Section Council discussed the issue of when "tolling" of the time for a delayed application should be available extensively in connection with the amicus brief it submitted in *Beavers*. The same concerns that surfaced at the time were raised again during our evaluation of the two proposals presented in ADM 2007-40.

In a common scenario, the Court of Appeals decides that the order appealed from was not "final." There was a broad consensus that tolling should be available in such circumstances, as well as in other cases where an appeal is dismissed for lack of jurisdiction. While the Court of Appeals typically conducts its jurisdictional reviews soon enough that a delayed application can be prepared and filed within 12 months from the date of the order appealed from, situations arise in which the jurisdictional defect is not recognized until well into the appellate process. If that occurs, the appellant should have some alternate route for requesting relief.

The entire Council, then, agreed that the concept of "tolling" should be recognized. Decisions on the merits are generally favored and it would be inequitable to leave an appellant with no remedy if an appeal is dismissed when – as is likely – many more than 21 days have passed since entry of the order in question. The principle embodied in "Alternative A," therefore, was supported by all.

Our views differed, however, as to whether tolling should apply in every case in which an appeal is dismissed. Some members strongly supported having a "safety valve" available for the unusual case in which unforeseeable circumstances lead to a dismissal. The sense was that it would be unjust to deprive the party of all opportunity for appellate review for reasons that may have been entirely outside its control. Several members noted that the proposal calls for tolling only of the time to apply for leave to appeal; whether the delay in an individual case warrants allowing the case to be heard anyway would remain within the discretion of the Court of Appeals. Others favored certainty in the appellate process and were concerned that a case that had been dismissed for legitimate reasons might be revived months later, forcing the appellee to incur additional costs and wait longer for a final decision.

Ultimately, the Section Council voted narrowly to endorse Alternative "A" of the proposal but to alert the court to the substance of its discussion. I hope this summary has conveyed that to you.

Please let me know if there is any way the Appellate Practice Section Council or its Court Liaison/Rule Comment Committee can be of assistance in this matter.

Very truly yours,

Barbara H. Goldman,
Chair

cc: Hon. Henry W. Saad, Chief Judge, Michigan Court of Appeals
Edward H. Pappas, President, State Bar of Michigan